

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EVANDER LEE BLAKES, SR.,

Defendant-Appellant.

UNPUBLISHED

May 11, 2004

No. 246415

Saginaw Circuit Court

LC No. 02-021745-FC

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

In this case arising out of the shooting death of defendant's estranged girlfriend, defendant appeals as of right his jury conviction of first-degree premeditated murder, MCL 750.316(1)(a), carrying a concealed weapon, MCL 750.227(2), and felony firearm, MCL 750.227b(1). Defendant was sentenced to 2 years' imprisonment for felony firearm, followed by concurrent sentences of 30 to 60 months' imprisonment for carrying a concealed weapon and life imprisonment without the possibility of parole for first-degree premeditated murder. We affirm.

Defendant first claims on appeal that the trial court misstated the law in instructing the jury that to reduce the crime of first-degree murder to second-degree murder, defendant's intoxication must negate the element of intent to kill, rather than the elements of premeditation and deliberation. We disagree. By expressly approving the instructions, defendant waived this issue on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Thus, this issue is unpreserved, and our review is limited to plain error affecting defendant's substantial rights. MCL 768.29; MCR 2.516(C); *People v Knapp*, 244 Mich App 361; 375624 NW2d 227 (2001). To avoid forfeiture under the plain error rule, defendant bears the burden to show that: 1) an error occurred, 2) the error was plain, i.e. clear or obvious, 3) and the plain error prejudiced substantial rights, i.e. that the error affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

With regard to the defense of intoxication, the trial court instructed the jury, "The defendant says that he could not have specifically intended to kill [the victim] because he was intoxicated with alcohol or drugs. You must decide what – whether the defendant's mind was so overcome by alcohol that he could not have formed that intent." It is well established that first-degree premeditated murder is a specific intent crime that requires the specific intent to take a life. *People v Garcia*, 398 Mich 250, 259; 247 NW2d 547 (1976); *People v Langworthy*, 416 Mich 630, 650; 331 NW2d 171 (1982). Voluntary intoxication is a defense to first-

degree premeditated murder that, if proven, will reduce the charge to second-degree murder. *Garcia, supra* at 259; *Langworthy, supra* at 646-647, 648-649.

Defendant cites *People v LaVearn*, 201 Mich App 679, 684; 506 NW2d 909 (1993), rev'd 448 Mich 207; 528 NW2d 721 (1995), and *Garcia, supra* at 262, to argue that intoxication only applies to the elements of premeditation and deliberation, but not the intent to kill. However, the *LaVearn* decision is not binding on this Court because our Supreme Court reversed it on appeal. See *Bradacs v Jacobone*, 244 Mich App 263, 268-269; 625 NW2d 108 (2001). Furthermore, neither *LaVearn* nor *Garcia* specifically hold that jury instructions must explicitly distinguish premeditation and deliberation from the intent to kill for the purposes of instructing on the defense of intoxication.

To the contrary, in *People v Savoie*, 419 Mich 118, 134; 349 NW2d 139 (1984), our Supreme Court specifically held, “The instruction given by the trial court in the instant case accurately informed the jury that the defense of intoxication would serve to negate the specific intent element of the crime charged, if the defendant ‘was so intoxicated that he was unable to form the intent’ and ‘so intoxicated that he could not form the intent.’ *This instruction was not erroneous*” (emphasis added). Moreover, our Supreme Court has explained that Michigan allows “intoxication to negate the element of premeditation (or intent to kill) and reduce the degree of the offense.” *Langworthy, supra* at 646-647. The Court went on to explain, “Specific intent to kill is a necessary constituent of the elements of premeditation and deliberation. It would be difficult, if not impossible, to premeditate and deliberate a killing without at the same time possessing the specific intent to kill.” *Id.* at 650. “The intent to kill in first-degree premeditated murder must be deliberate and premeditated.” *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984; See *id.* at 516-517 (Boyle, J., concurring) (“[T]he concepts of wilfulness, deliberation, and premeditation in the context of first-degree murder necessarily imply a specific intent to kill. It is the intent to kill which must be premeditated”).

Even if jury instructions are somewhat imperfect, there is no error if they fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). Looking at the jury instructions in their entirety, see *id.*, the instructions were more than sufficient to convey to the jurors that in addressing defendant’s claim of intoxication, they had to assess whether defendant was unable to form the specific intent to kill the victim, and formation of that specific intent required a determination of his ability to premeditate and deliberate. The court’s instructions in the present case with respect to the application of the defense of intoxication to the crime of first-degree premeditated murder were proper.¹

¹ We also note that even if we found that the court’s instructions were in error, that error would not have prejudicially affected defendant’s substantial rights because it would not have affected the outcome of the lower court proceedings. See *Carines, supra* at 763. There was sufficient evidence presented to support a finding that defendant intentionally killed the victim with premeditation and deliberation, and that defendant’s mind was *not* so overcome by alcohol that he could not have formed the requisite intent. See *Garcia, supra* at 263 (“The task of the
(Continued...)

Defendant also argues that he was denied his constitutional right to effective assistance of counsel because defense counsel failed to object to the allegedly erroneous jury instructions regarding the applicability of the defense of intoxication to the crime of first-degree premeditated murder. We disagree. An evidentiary hearing or motion for new trial must precede a claim of ineffective assistance of counsel. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Here, neither request was made; therefore, defendant's claim is considered only to the extent that counsel's claimed mistakes are apparent on the record. *Id.*

In reviewing claims of ineffective assistance of counsel, we use the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Under the *Strickland* test, a defendant must show: (1) that counsel's performance was deficient to the extent that it fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's deficient performance so prejudiced the defendant that it deprived him of a fair trial – that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 303; *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003); *Strickland, supra* at 694.

Defendant was not deprived of the effective assistance of counsel because counsel need not object to the jury instructions that were proper as given, and even if trial counsel had sought a clarification, the outcome of the case would not have been affected. See *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002); *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio

reviewing court must be to examine the record to determine whether the evidence was ample to warrant a verdict of guilty beyond a reasonable doubt of the crime charged”).